NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WELLS FARGO BANK, N.A. Appellee v. KELLY, DAVID W. AND JOAN L. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1700 MDA 2013

Appeal from the Judgment Entered August 30, 2013
In the Court of Common Pleas of Perry County
Civil Division at No(s): CV-2012-194

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J. **FILED JUNE 25, 2014**

Appellants, David and Joan Kelly, appeal from the grant of summary judgment to Appellee, Wells Fargo Bank, N.A. ("Wells Fargo"). Appellants assert that genuine issues of material fact are in dispute and, as such, Appellee was not entitled summary judgment. Appellants specifically contend that the denials as conclusion of law are not admissions. We disagree with Appellants' arguments and affirm the trial court in its grant of summary judgment to Wells Fargo.

On February 24, 2012, Appellee commenced an *in rem* foreclosure action against Appellants by filing a complaint in the Court of Common Pleas of Perry County. In the complaint, Appellee averred (a) the mortgage was

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* Retired Senior Judge assigned to the Superior Court.

executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Washington Savings Banks ("WSB"), which Mortgage was recorded; (b) the mortgage had been assigned to Appellee, which assignment was recorded prior to the filing of the Complaint; (c) Appellants had defaulted on their obligation under the mortgage; and (d) the amounts due and owing under the mortgage. ***See*** Complaint at ¶¶1-2.

In its complaint, Appellee stated the following:

> 5. The mortgage is in default because monthly payment of principal and interest upon said mortgage due 12/01/2007 and each month thereafter are due and unpaid, and by the terms of said mortgage, upon failure of mortgagor to make such payments after a date specified by written notice sent to Mortgagor, the entire principal balance and all interest due thereon are collective forthwith.

6.	Principal Balance	$88,776.93
	Interest	$23,670.78
	11/01/2007 through 11/10/2011	
	Late Charges	$176.70
	Property Inspections	$435.00
	Escrow Deficit	$7,386.97
	TOTAL	$120,446.38

Complaint at ¶2.

On March 22, 2012, Appellants filed their answer to the complaint with new matter and counterclaims. In their answer, Appellants denied executing and delivering the mortgage, the assignment of the mortgage to Appellee,

defaulting on the payment obligation under the Mortgage, and amounts due and owing under the Mortgage as "conclusions of law." Complaint at ¶¶1-2.

In their answer, Appellants stated the following:

> 5. Denied. The averments contained in Paragraph 5 are conclusions of law to which no response is required.
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> 6. Denied. The averments contained in Paragraph 6 are conclusions of law to which no response is required. By way of further response, Defendants have requested from plaintiff a detailed summary of all transactions relating to the mortgage for the property located at 39 South Main Street, Marysville, PA 17053, which Plaintiff failed to produce.

Answer, at ¶¶5-6.

Appellee then filed preliminary objections to Appellants' counterclaims and, thereafter, the trial court sustained Appellee's preliminary objections and dismissed the counterclaims without prejudice. Appellants' new matter did not include any factual allegations in support of their defenses. On April 3, 2013, Appellee filed a motion for summary judgment arguing that there was no disputed issue of material fact regarding its entitlement to an *in rem* judgment in foreclosure. The trial court subsequently granted the motion for summary judgment. This timely appeal followed.

We will reverse a grant of summary judgment when the trial court commits an error of law or abuses its discretion. ***See Grutteridge v. A.P. Green Serv., Inc.***, 804 A.2d 643, 651 (Pa. Super. 2002). We examine the record in a light most favorable to the non-moving party, and any doubt must be resolved against the moving party. ***See Potter v. Herman***, 762

A.2d 1116, 1118 (Pa. Super. 2000). The moving party has the burden of proving that no genuine dispute of material facts exists. ***See Basile v. H & R Block, Inc.***, 777 A.2d 95, 101 (Pa. Super. 2001).

Summary judgment may only be granted where the record demonstrates beyond any doubt the absence of genuine issue of material facts, and that on the facts adduced, the moving party is entitled to judgment as a matter of law. ***See Kafando v. Erie Ceramic Arts. Co.***, 764 A.2d 59, 61 (Pa. Super. 2000). As such, "[a] proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. . . ." ***Gateway Towers Condo. Ass'n v. Krohn***, 845 A.2d 855, 858 (Pa. Super. 2005) (quoting ***McCarthy v. Dan Lepore & Sons Co., Inc.***, 724 A.2d 938, 940 (Pa. Super. 1998)).

In actions for *in rem* foreclosure due to the defendant's failure to pay a debt, summary judgment is proper where the defendant admits that he had failed to make payments due and fails to sustain a cognizable defense to the plaintiff's claim. ***See Gateway***, 845 A.2d at 858.; ***First Wis. Trust. Co. v. Strausser***, 653 A.2d 688, 694 (Pa. Super. 1995).

Turning to the merits of this case, the facts are essentially the same as in ***Strausser***. In ***Strausser***, the mortgagor responded to the bank's allegation in the complaint that the total amount due was $349,829.96 by

denying the allegation as a conclusion of law. ***See*** 653 A.2d at 694. The panel noted that such an assertion by the mortgagor "amounted to nothing more than general denials which are considered admissions under Pa.R.C.P. 1029(b)…." ***Id***. Thus, the trial court's entry of summary judgment was proper.

As in ***Strausser***, Appellants have responded to Appellee's allegation by denying it as a conclusion of law. Appellants argue, however, that they have not admitted to a failure to make the payments due because their denials were made pursuant to Pa.R.C.P. 1029(d) and that such denials are not deemed admissions. Rule 1029(d) states, "[a]verments in a pleading to which no responsive pleading is required shall be deemed to be denied." Pa.R.C.P. 1029(d); ***see Bowman v. Mattei***, 455 A.2d 714, 716 (Pa. Super. 1983). While it is true that mere conclusions of law require no denial because they are deemed to be denied, the averments by Appellee are more than just conclusions of law as they also include assertions of fact that require specific denials.

A careful review of Appellee's complaint shows that paragraph 5 contains both conclusions of law and assertions of fact. The assertion that Appellants were in default of their mortgage is indeed a conclusion of law to which Appellee needs factual support and to which Appellants need not reply. However, following that statement, Appellee makes factual assertions that Appellants failed to make timely payments starting in December 2007.

Such assertions of fact are well within the knowledge of the mortgagor. ***See***, ***e.g.***, ***New York Guardian Mortg. Corp. v. Dietzel***, 524 A.2d 951, 952 (Pa. Super. 1987). Therefore, Appellants cannot rest on their answer and assertion that Appellee's averment was a conclusion of law. Because Appellants would be the only party, aside from Appellee, to have the specific knowledge to refute the assertion, Appellants have failed to properly respond in their answer pursuant to Pa.R.Civ.P. 1029(c).

Our case law has made it clear that a party cannot rely on rule 1029(c) to excuse the failure to properly admit or deny factual allegations. ***See Dietzel***, 524 A.2d at 952; ***Cercone v. Cercone***, 386 A.2d 1, 4 (Pa. Super. 1978). Such a failure by Appellants to properly admit or deny the facts asserted constitutes an admission. Therefore, Appellants have admitted to the facts set forth in paragraph 5 of the complaint.

We now turn to Appellants' answer to paragraph 6 of the complaint. If as Appellants assert in paragraph 6 of their answer that Appellee stated a conclusion of law, it is puzzling why he would need more factual information— the request for a "detailed summary of all transactions relating to the mortgage for the property." In ***Piehl v. City of Philadelphia***, 930 A.2d 607, 616 (Pa. Cmwlth. 2007), the Commonwealth Court encountered a similar situation. There, defendant wrote in his answer that plaintiff's averment was a conclusion of law to which no response was required and at the same time requested that the plaintiff show factual support of the

conclusion. ***See id***. The Commonwealth Court concluded that defendant's answer amounted to an admission under Pa.R.Civ.P 1029(b) because defendant's demand for strict proof, notwithstanding the conclusion of law, did not relieve him of the burden to file a proper responsive pleading. ***See id***.

Here, Appellants have responded to the plaintiff's averment by stating that it was a conclusion of law to which no response was required and wanted more information. As in ***Piehl***, such an answer by Appellants amounts to an improper responsive pleading under 1029(b) and is deemed an admission. Therefore, Appellants have admitted to paragraph 6 of the complaint.

Because Appellants' answers to the complaint serve as admissions, they have admitted to the failure to make the necessary mortgage payments. As such, the trial court did not abuse its discretion in granting summary judgment.[1]

Judgment affirmed.

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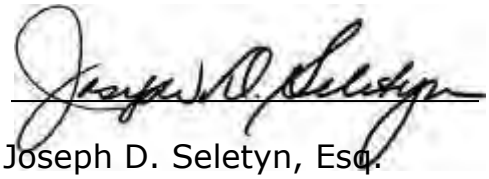
[1] We need not address Appellants argument that the new matter remains unresolved because they failed to raise that argument in their Pa.R.A.P. 1925(b) statement. As such, that argument is waived on appeal pursuant to Pa.R.A.P. 1925(b)(4)(vii).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/25/2014